Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1993

DOCTOR NUI LOA PRICE, AKA MAUI LOA, individually and in the capacity of Chief of The Hou Hawaiians; THE HOU HAWAIIANS, a native Hawaiian Ohana; and KAMUELA PRICE, individually and in the capacity of member of the Elder Council of The Hou Hawaiians,
Petitioners,

v.

MOANIKEALA AKAKA; ROD BURGESS; CLARENCE CHING; FRENCHY DESOTO; LOUIS HAO, MANU KAHAIALII; THOMAS KALUKUKUI, SR.; MOSES KEALE, SR.; and KEVIN MAHOE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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76 pp

QUESTION PRESENTED

Whether officials of the state of Hawaii performing the duties of trustees under the trust established by § 5(f) of the Hawaii Admission Act have qualified immunity from an action alleging that they expended trust funds for uses and purposes other than those authorized by the terms of the trust?

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DOCTOR NUI LOA PRICE, AKA MAUI LOA, individually and in the capacity of Chief of The Hou Hawaiians; THE HOU HAWAIIANS, a native Hawaiian Ohana; and KAMUELA PRICE, individually and in the capacity of member of the Elder Council of The Hou Hawaiians,

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners DOCTOR NUI LOA PRICE, THE HOU HAWAIIANS, and KAMUELA PRICE, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS IN THE CASE

The amended opinion of the U.S. Court of Appeals for the Ninth Circuit sought to be reviewed is reported as *Price v. Akaka*, 9 F.3d 1220 (*"Akaka II"*), and is reprinted in the Appendix at pp. 1a-13a.

The District Court's unreported "Order Granting in Part and Denying in Part Motion for Judgment on the Pleadings, or in the Alternative for Summary Judgment,

and Denying Motion to Amend Complaint, and Motion to Strike Exhibits, Motion for Sanctions", filed on June 12, 1992, is reprinted in the Appendix at pp. 14a-38a.

The order of the Court of Appeals for the Ninth Circuit amending the opinion of the court sought to be reviewed is reprinted in the Appendix at pp. 39a-40a.

The amended opinion in an earlier appeal in this case is reported as *Price v. Akaka* 928 F.2d 824 (9th Cir. 1990)("*Akaka I*"). A petition by respondents herein for certiorari to review *Akaka I* was denied by this court *sub nom Akaka v. Price*, --- U.S. ---, 112 S.Ct. 436, 116 L.Ed.2d 455 (1991).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit of which Petitioners seek review was filed and entered on August 23, 1993, and a timely petition for rehearing by Petitioners was filed on September 7, 1993. The amended opinion and amended judgment were entered by the Court of Appeals on November 2, 1993. The time in which this Petition may be filed thus extends to and includes January 31, 1994, and this Petition is timely. Jurisdiction in the District Court was conferred by 28 U.S.C. § 1343. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1983 of Title 42 of the United States Code provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For

the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Sections 4 and 5(a), 5(b) and 5(f) of the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) provide that

> **§ 4.** As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees, shall not be changed except with the consent of the United States; and (3) that all

proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

§ 5. (a) Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.

(b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

* * *

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the

Hawaiian Homes Commission Act[1], 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

Section 201(a)(7) of the Hawaiian Homes Commission Act, 1920 ("HHCA"), ch. 42, 42 Stat. 108 (July 21, 1921), provides that

> (7) the term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.[2]

Section 10-2 of the Hawaii Revised Statutes (1979) provides in pertinent part as follows:

> "Hawaiian" means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian

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[1] The definition of the term "native Hawaiian" is set forth below.

[2] This definition shall apply herein whenever the term "native Hawaiian" is used.

Islands in 1778, and which peoples thereafter have continued to reside in Hawaii;[3]

STATEMENT OF THE CASE

A. Statutory Background. Prior to the arrival of Capt. Cook in the Hawaiian Islands in 1778, the aboriginal people had no concept of "ownership" of real property. Indeed, the idea of land as "property" was unknown. *Aina*, the land, was considered sacred. It was not a commodity capable of being "owned" by a mere, mortal human being. It was a community resource like the air and water.

Under Western influence, Hawaiians were introduced to the concept of land "ownership" with the idea that the king "owned" the land. At first, the king's title was in the nature of a trust. The Constitution of 1845 of the Kingdom of Hawaii, declared that all of the land was owned by the King, not outright as his own private property, but rather for the benefit of the people.

In 1848, private fee simple ownership of land was instituted in the great *mahele* by the government of Kamehameha III. Theoretically, the land was to be divided into thirds--one third for the King, one third for the chiefs, and one third for the people.

Unfortunately, this goal was not realized in practice. Instead, only 28,660 acres went to the people, while 1,571,000 acres were awarded to the chiefs and the remainder was retained by the King or government.

By 1920, native Hawaiians were "a landless people in the country of their forefathers." Sen. Doc. No. 151, 75th Cong., 3d Sess, Serial Set 10247 (Jan. 5, 1938), pp. 81-83.

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[3] This definition shall apply herein whenever the term "Hawaiian", as distinguished from "native Hawaiian", is used.

In order to redress this injustice and rehabilitate the native Hawaiian people, Congress enacted the HHCA. *Id*, at p. 83. By this act, more than 200,000 acres, designated "available lands", were set aside to be awarded to native Hawaiians[4] as 99-year leasehold homesteads at a rental of one dollar per year.

In 1947, H.R. 49, which ultimately became the Hawaii Admission Act, was introduced in the 80th Congress by Delegate Farrington. The original draft as proposed by the Hawaii delegation provided that, on admission to the Union, Hawaii would receive title to all of the public lands within the state, including the "available lands". The bill also provided that the state would adopt HHCA as a state law, subject to amendment in the same manner as the state constitution. H. Rep. No. 194, 80th Cong., Serial Set 11118 (Mar. 27, 1947).

The Secretary of the Interior objected to these provisions. To ensure enforcement of HHCA after statehood, the Secretary suggested that the federal government retain legal title to the "available lands" and proposed the "compact" language which ultimately became § 4 of the Admission Act and the trust language which is now found in § 5(f) of the Admission Act. Further the Secretary proposed that the state be allowed to select only one-ninth part of the public lands, approximately 200,000 acres, as land grants for schools and other public purposes. Similar grants, ranging between one and four sections per township, or between one-thirtysecond and one-ninth, had been given to all of the other states admitted into the Union prior to that time. *Id.*, p. 16.

The House Committee on Public Lands adopted a compromise. It approved the compact and trust lan-

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[4] See footnote 2.

guage now found in §§ 4 and 5(f) and provided that the new state would be allowed to select 180,000 acres at the time of admission. A study commission would then be established to propose the disposition of the remaining public lands. If Congress had not taken any further action on the subject within five years, title to the remaining public lands would pass to the state. *Id.*, pp. 4-5, 22-23.

Subsequent amendments eliminated the study commission provision. Thus, in 1959, on admission to the Union, Hawaii received title to approximately 1.4 million acres, including the "available lands". Admission Act, § 5(b). This is more than eight-tenths of the 1.7 million acres of public lands within the state. In consideration for which, Hawaii agreed to implement HHCA by accepting the compact provisions of § 4 and trust provisions of § 5(f).

By subsequent enactment of state law, OHA was established, to receive one-fifth of the income from the § 5(f) trust corpus, exclusive of the "available lands". Said funds are to be expended by the OHA board of trustees "for the betterment of the conditions of native Hawaiians." App. 15a, n.2.

B. Factual Background. From the inception of OHA, the state's goal has been to eliminate the 50% blood quantum requirement established by Congress in HHCA. App. p. 12a. This effort was frustrated by Attorney General Opinion No. 83-2 dated April 15, 1983, in which the Attorney General of the State of Hawaii answered the following question posed by OHA:

> By letter dated March 15, 1983, you requested our opinion on the following question:
>
> May the legislature, consistent with Section 5(f) of the Admission Act and Article XII of the State Constitution, authorized [sic] OHA to use funds derived from the Public Land Trust (Section 5(f) of the Admis-

sion Act) to better the conditions of Hawaiians as defined in Hawaii Revised Statutes, Section 10-2(5)?

We answer in the negative.

App. p. 25a.

OHA then set out to change the definition of "native Hawaiian" to eliminate the blood quantum requirement. Respondents (hereafter "Trustees") retained private counsel, Sherry Broder, who opined on July 12, 1988 that the Trustees could not only advocate such a change but could even use trust funds to do so, provided they determined that changing the definition would result in a benefit to the "native Hawaiian" trust beneficiaries. App. p. 28a.

Following this advice, the Trustees determined that adoption of a single definition would better the condition of native Hawaiians, in that the blood quantum requirement had long been recognized as the single most divisive issue in the Hawaiian community. App. p. 23a

Trustee Moses Keale, Sr., was not satisfied with Ms. Broder's opinion so he requested another, more specific, opinion from the State Attorney General as to the appropriateness of using § 5(f) funds to change the beneficiary definition. Specifically, Mr. Keale requested an opinion as to whether special funds derived from the public land trust and set aside to be held and used solely as a "public trust for the betterment of conditions of native Hawaiians", section 10-3(1), HRS, could properly be expended to advocate a change in existing law to create a single definition of the term "native Hawaiian" to include "Hawaiians" as the term is defined in section 10-2, HRS. App. p. 28a.

On July 28, 1988, the Attorney General's Office advised OHA that the use of special funds was restricted solely to "the betterment of the conditions of native Hawaiians", and use for the purpose of bettering the conditions of all Hawaiian people, rather than just native

Hawaiians would not be proper. The letter from the Attorney General provided in relevant part:

> Thus, we conclude that the use of funds derived from the ceded land funds to advocate a change in the law to provide for a single definition, is not a use *solely* for the betterment of conditions of native Hawaiians. Furthermore, such a use is inconsistent with the foremost goal to be pursued by OHA, the betterment of conditions of native Hawaiians.

App. pp. 28a-29a.

Undeterred by two strong warnings by the State Attorney General, the Trustees made appropriations of $23,200 for a media/public relations campaign to "educate" OHA beneficiaries[5] and to advocate ratification the single definition referendum, $10,000 as part of a «protocol» fund for the Ad Hoc Committee working on the proposed referendum, and $57,000 for a professional advertising campaign. App. p. 29, n.12.

C. Proceedings Below. On October 18, 1988, Petitioners[6] (hereafter "The Hou") filed a civil rights complaint in the U.S. District Court for the District of Hawaii, pursuant to 42 U.S.C. § 1983, alleging that Trustees violated § 5(f) of the Admission Act. The Hou seek to recover damages on behalf of the trust from the Trustees in the amount of funds expended by them to benefit

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[5] OHA beneficiaries are "Hawaiians *and* native Hawaiians".

[6] Plaintiff The Hou Hawaiians is a native Hawaiian Ohana or tribal body made up of related families of native Hawaiians. Plaintiff Doctor Nui Loa Price is the hereditary chief of the Hou Hawaiians and a native Hawaiian. Plaintiff Kamuela Price is not a native Hawaiian. He is the father of Maui Loa and is a member of the elder council of the Hou Hawaiians.

Hawaiians who are not native Hawaiians, in particular, by advocating a change in the class of beneficiaries to eliminate the blood quantum requirement. App. pp. 16a, 23a, and 31a, n.16.

Before answering, Trustees filed a motion to dismiss on grounds of failure to state a claim. App. p. 35a, n.17. On January 11, 1989, the district court granted Trustees' motion to dismiss the complaint holding that the complaint failed to state a claim because the Admission Act did not impose the obligations which The Hou assert were violated, and because the suit was against Trustees in their official capacities and therefore barred by the Eleventh Amendment. Judgment was entered in favor of Trustees on January 17, 1989, and The Hou appealed. App. p. 16a.

On March 21, 1991, the Ninth Circuit reversed that judgment of the district court. The Ninth Circuit held that The Hou stated a claim under 42 U.S.C. § 1983 for violations of § 5(f) by alleging in their complaint that Trustees have expended the trust income on purposes other than those listed in § 5(f). *Price v. Akaka*, 928 F.2d 824, 826, (9th Cir.), *cert. denied* 112 S.Ct. 436 (1991).

Trustees' petition for rehearing, raising the issue of qualified immunity for the first time, was denied by the Ninth Circuit Court. In a petition to this Court for a writ of certiorari to review that decision of the Ninth Circuit, Trustees again raised the qualified immunity defense. *Akaka v. Price*, S.C. No. 90-1941. The Hou opposed that petition on the grounds that the issue had not been adequately raised below and had been waived by failure to raise it in the motion to dismiss. S.C. No. 90-1941, Br. in Opp., p. 2.

On November 18, 1991, this Court denied Trustees' petition for certiorari. 116 L.Ed.2d 455. On the very same day, Trustees filed an omnibus motion to dismiss the complaint or, alternatively, for summary judgment. App. p. 36a. The grounds for this motion were as

follows: (1) that either judgment on the pleadings or summary judgment was appropriate because The Hou's claims fail on the merits, (2) Trustees were entitled to qualified immunity, (3) Trustees were entitled to absolute immunity, and (4) § 5(f) is unenforceable via 42 U.S.C. § 1983 in view of *Suter v. Artist M.*, 112 S.Ct. 1360 (1992). App. 17a.

With respect to the issue of qualified immunity, the Hou opposed the motion on three grounds. They argued that the use of § 5(f) trust funds to advocate a change in the definition of trust beneficiaries was a *per se* violation of § 5(f). A matter about which the Trustees had no discretion and, therefore, no immunity. The district court rejected this argument. App. p. 24, n.8.

The Hou argued that qualified immunity was not available to the Trustees, because the law was sufficiently clear in 1988 that use of § 5(f) trust funds in their control was limited *solely* to the betterment of the conditions of native Hawaiians and not Hawaiians. The district court agreed and denied the Trustees motion with respect to the use of funds for the single definition referendum.

The district court found that the Attorney General opinion issued in 1983 unequivocally advised the Trustees that the Hawaii legislature could not authorize the use of § 5(f) funds to better the conditions of Hawaiians. App. p. 30a.

The district court further found that the contours of the law in 1988 were "sufficiently clear that a reasonable official would understand that what he was doing violates that right." Therefore, if § 5(f) funds were used to advance the single definition referendum, Trustees would not be entitled to qualified immunity for their actions. App. p. 30a.

The Trustees filed an immediate appeal from to the Ninth Circuit Court from this adverse ruling on qualified immunity. The Court of Appeals did not discuss The

Hou's argument that use of § 5(f) trust funds to change the definition of beneficiaries was a matter in which they had no discretion and, therefore, no qualified immunity.

The Court of Appeals reversed, holding that the Trustees were entitled to qualified immunity on the single definition referendum issue, because they found that changing the definition would benefit the present native Hawaiian beneficiaries by removing the blood quantum source of divisiveness in the Hawaiian community.

The Hou also argued below, as in their opposition to the Trustees petition for certiorari in S.C. No. 90-1941, that the Trustees waived the defense of qualified immunity when they failed to raise it in their first motion to dismiss the complaint. Neither the district court nor the court of appeals addressed this argument in their opinions.

REASONS WHY THE WRIT SHOULD ISSUE

The Report to the Governor and the Legislature of the State of Hawaii, "Management and Financial Audits of the Office of Hawaiian Affairs, by The Auditor of the State of Hawaii, Rep. No. 93-28, December, 1993 explains:

> In Act 35, SLH 1993, the Legislature appropriated $136.5 million to OHA for back payments and interest on OHA's share of previously collected public land trust revenues. OHA received these funds by June 30, 1993. These revenues transform OHA from a relatively minor state agency to a major force that can have a significant impact on Hawai'i.

Id. at p. 5.

> Changes in OHA and its funding make it appropriate for the Board of Trustees and OHA to reconsider their basic responsibilities and duties and to determine how they can better meet the new challenges. In this context, it is particularly important for the board to have an understanding of its fiduciary

responsibilities and for OHA to strengthen its management.

OHA is governed by a Board of Trustees (board) that is the policy and decision making body of OHA. The board consists of nine trustees elected by Hawai'i residents of Hawaiian ancestry who have registered to vote for the OHA board. * * *

Chapter 10, HRS, affirms the State's trust obligations to the native Hawaiians and the State's delegation of this obligation to OHA. OHA and the trustees are therefore fiduciaries to the native Hawaiians and Hawaiians. OHA's policies and procedures manual further acknowledges this trust relationship by stating that the board shall act according to the highest fiduciary standards of a private trustee.

As fiduciaries, trustees have certain fundamental duties. The duties of trustees with respect to their actions on behalf of beneficiaries are based on trust law. [The auditor here cites George T. Bogert, *Trusts, Sixth Edition*, Hornbook Series Student Edition, West Publishing Co., St. Paul, MN, 1987, 793 pgs.] Three fundamental duties are marshaling resources, loyalty, and prudence.

Id. at p. 6.

A second fundamental duty of a fiduciary is that of loyalty. Loyalty implies that trustees must administer the trust solely in the interest of the beneficiaries. Trustees must refrain from any activities that would result in a gain by a trustee or a third party at the expense of the trust.

The duty of loyalty also subjects trustees to higher and stricter standards of conduct than those associated with ordinary business relationships. When there are co-trustees, such as at OHA, individual trustees are also responsible for preventing other trustees from committing a breach of trust and for redressing any breach of trust that has been committed.

Id. at p. 8.

> With respect to the duty of loyalty, some trustees cited their responsibilities to the constituents who elected them rather than to the beneficiaries of the trust as a whole. Other trustees equated their role with that of legislators. This is correct to the extent that legislators have an implied fiduciary responsibility. It is insufficient, however, in that OHA is an express trust where trustees have specific duties and obligations to the beneficiaries.
>
> Seeing themselves as equivalent to legislators would permit board members to engage in activities that would not be appropriate for trustees who are held to the higher fiduciary standard dictated by the duty of loyalty. For example, it would appear inappropriate for an elected trustee to advocate terminating OHA while in a fiduciary role. The trustees' understanding of loyalty is also called into question by other actions. Some OHA staff offices have complained that some trustees have used OHA facilities for personal purposes.

Id. at p. 9.

> The board, as a fiduciary, is responsible for assuring that OHA operates in a prudent, diligent, and effective manner on behalf of all the beneficiaries of the trust.

Id. at p. 11.

> OHA has two trusts from two major sources of funding--one for native Hawaiians and one for Hawaiians. The trust for native Hawaiians is funded by the 20 percent pro rata portion of the revenues from the public land trust received by OHA. The Admission Act restricts the use of these funds to programs that benefit native Hawaiians. The trust for Hawaiians is supported by the State's general fund.
>
> * * *
>
> Recent legal decisions have expanded the interpretation of "betterment of the condition of native

> Hawaiians.' This expanded interpretation gives OHA more flexibility in the use of native Hawaiian trust funds, but OHA still needs general fund appropriations from the Legislature to fund programs for Hawaiians. The Legislature and OHA have generally followed a practice of matching general funds and trust revenues for OHA's operating budget.
>
> The basis for dual funding is the continued classification of Hawaiians into two groups by blood quantum. The Constitutional Convention hoped to remove this distinction -- OHA has conducted two referenda on the blood quantum distinction; both referenda supported the removal of the distinction. Resolution of this issue remains one of OHA's objectives.

Id. at p. 18.

The duty of loyalty which prevents the trustee from acting to benefit third parties at the expense of the trust is so well established that the State Auditor was able to understand and properly explain it. Undivided loyalty to the beneficiary is clear. The Trustees were advised of this duty of loyalty by Attorney General opinions in October, 1983 and July, 1988. They were told that § 5(f) trust funds can be used *solely* to benefit native Hawaiians.

There are only about 25,000 native Hawaiian beneficiaries of the § 5(f) trust. On the other hand there are more than 250,000 Hawaiians. It is not surprising that trustees elected by Hawaiians would want to change the definition of the class of beneficiaries to benefit all of their constituency. It is not surprising that their constituents voted to approve the change.

However, neither the Hawaii Legislature nor the Court of Appeals has the power or authority to sanction a change of ten-fold increase in the beneficiary class defined by Congress. *See* Annotation, "Extension of Charitable Trust Benefits", 68 A.L.R.3d 1049 (1976). Even if elimination of the blood quantum may have been of some benefit to native Hawaiian beneficiaries by

eliminating divisiveness in the Hawaiian community, that benefit is secondary. Non-native Hawaiians will receive the primary benefit of changing the class definition. By advocating the change in class definition, the Trustees violated their duty of undivided loyalty, even if they had not used trust funds for the purpose.

The Auditor's Report discloses that the present OHA trustees are persisting with their efforts to enlarge the class of beneficiaries. They apparently believe the decision of the Court of Appeals in this case gives them more "flexibility" in the use of trust funds.

Because of number of beneficiarise involved, their status as native wards of the government, the amount of money, and the "significant impact" that OHA has on the State of Hawaii, The Hou submit that this Court should grant the writ of certiorari to correct a serious error on the part of the Court of Appeals.

But there is much more to this case than simply an illegal attempt by the Trustees to enlarge the beneficiary class. The underlying issue in this case is whether the state of Hawaii should be allowed to continue to violate federal law intended to provide farms and homes for native Hawaiians, while using the homeless plight of native Hawaiians as the basis for claims against the United States for land, resources and money damages totalling tens of billions of dollars. OHA's effort to change the definition of the beneficiary class was just the first step in a plan by the state to do exactly that.

Congress enacted the Hawaiian Homes Commission Act more than 70 years ago to return native Hawaiians to the land that had been wrongfully taken away from them. In 1959, at statehood, Congress accepted the solemn compact from the state that it would implement the program. Congress gave the state 1.4 million acres of land with which to accomplish this goal.

Since statehood, the state has all but abandoned the HHCA homestead program. One might say it has been

"grossly neglected." Numerous government reports and studies have come to this conclusion.[7] Few programs have been the subject of so many investigations and reports. If as much time, money and energy had been put into implementation of the program as studying it, many more native Hawaiians would be living on their homesteads.

The shameful treatment of native Hawaiians by their own state government was brought to the attention of the entire nation on September 9, 1991 in "Broken Promise: How Everyone Got Hawaiians' Homelands Except Hawaiians", a full-page article on pages 1 and 3 of the *Wall Street Journal* by Susan C. Faludi.

Many of the Hou Hawaiians have personal experiences exactly like those described by Ms. Faludi in this article. Several members of The Hou Hawaiians are or have been homeless. Some live in tents on the beaches, others live in old abandoned busses. Many members

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[7] *Breach of Trust? Native Hawaiian Homelands*, Hawaii Advisory Committee to the U.S. Commission on Civil Rights, October, 1980; *Review of Hawaiian Homes Commission Programs*, U.S. Dept. of the Interior, Office of Inspector Genera, Audit Report, September, 1982; *Report on the CULTURE§ NEEDS AND Concerns of Native Hawaiians*, Native Hawaiian Study Commission, June, 1983; *Report to the United States Secretary of the Interior and the Governor of the State of Hawaii*, Federal-State Task Force on the Hawaiian Homes Commission Act, August, 1983; *Final Report on the Public Land Trust*, Legislative Auditor of the State of Hawaii, Rep. No. 86-17, December, 1986; *A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians*, Hawaii Advisory Committee to the U.S. Commission on Civil Rights, December, 1991; *Progress Report on the Implementation of Recommendations of the Federal-State Task Force*, Office of the Governor of the State of Hawaii, January, 1992; *Hawaiian Homes Commission*, U.S. Dept. of the Interior, Office of Inspector General, Audit Report, Rep. No. 92-I-641, March, 1992; *Management and Financial Audit of the Department of Hawaiian Home Lands*, Auditor of the State of Hawaii, Rep. No. 93-22, December, 1993

have been on the waiting list for a homestead award for more than ten years. One homeless member has been waiting for thirty years.

All of these reports and articles have not resulted in any improvement of the condition of native Hawaiians because the state blames the federal government for the problem. The state claims that the federal government has failed to provide funding for the program. The state consistently refuses to consider using income from the § 5(f) corpus as a means of funding the program.

If the state had been acting in good faith, it could have long ago completely implemented the Hawaiian Homes program. The number of beneficiaries is relatively small and the resources are vast.

The Department of Hawaiian Home Lands has approximately 14,000 pending applications for homesteads. DHHL has estimated that it will cost approximately $2.4 billion to provide 14,000 homesteads over the next ten years. This estimate is exaggerated, because the state wants to get the money from the federal government.

In fact, much of this expense would be used to provide paved streets with curbs, gutters, sidewalks, street lights, fire protection and sewers, all required by state and local subdivision laws and ordinances. This kind of infrastructure is not necessary for agricultural purposes. All that is necessary is an all-weather road and water. Most of the expense of infrastructure is created by state and local laws that could be waived in the case of Hawaiian homesteads. Able bodied native Hawaiians could provide much of the infrastructure themselves, if only allowed to occupy the land.

At the present time, OHA has $150,000,000 in § 5(f) trust funds, which represents only a small portion of the

trust income over the past ten years.[8] This sum represents much *less* than the 20 percent of § 5(f) trust that OHA was supposed to have received over the past 10 years. Thus the total income in ten years was more than $750 million. This amount is much less than it should have been because the inadequate revenues the state received from lessees, licensees, permittees and trespassers on § 5(f) trust lands. Many cases can be found where lessees are paying as little as ten percent of the appraised fair market rental.

Thus, the total revenues from trust lands in the 35 years since state hood have probably actually been at least $ 2.4 billion and should have been several times that much.

Of course OHA would not consider using any of its funds to provide infrastructure for Hawaiian homesteads. Rather than spend trust funds to better the condition of native Hawaiian, the Trustees have been accumulating and reinvesting income as a means of enhancing their own personal political power. Now that the accumulated trust funds in OHA's control exceeds $150,000,000 they have proclaimed themselves "players" in the Hawaii political arena.

Instead of using the trust funds to better the conditions of the native Hawaiian beneficiaries, OHA has embarked on this campaign to change the definition of "native Hawaiian" to eliminate the 50% blood quantum restriction and then seek billions of dollars in land, resources and damages from the federal government in the name of native Hawaiians. At the same time the scheme will relieve the state of any further obligation to

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[8] In the settlement of OHA's 10-year legal battle with the state over its share of the § 5(f) trust revenue, OHA did not get a full 20 per cent share of all of the § 5(f) trust fund income. It gave up its claim to a share of the $1 billion lease rent from Duty Free Shopper's concession at the Honolulu International Airport.

native Hawaiians, and clear title to 80 percent of the § 5(f) trust lands.

The plan was described in the Honolulu *Star-Bulletin & Advertiser*, July 23, 1989, p. A-8, as follows:

> OHA's Blueprint for Native Hawaiian[9] Self-Determination and Land Claims outlines the basis of Hawaiian claims for redress for the illegal overthrow of the Kingdom of Hawaii in 1893 -- and then says what Congress should do to resolve them.
>
> It also describes a process for setting up a sovereign entity that would transform the state-constituted OHA into a native-created government with its own governing document.
>
> * * *
>
> [Trustee Rodney] Burgess calls the blueprint "a concerted game plan to collectively garner all resources into a single structure or organization truly representative of all our people."
>
> * * *
>
> [The blueprint] concludes that to achieve the goals, OHA must propose legislation in Congress that acknowledges the right of native Hawaiians to self-determination and a sovereign status and provides for the return of lands and resources to native Hawaiians.

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[9] In OHA's Blueprint the term "native Hawaiian" is not limited to persons of 50% or more Hawaiian ancestry. As used here the term Native Hawaiian includes persons of any amount of Hawaiian ancestry.

The major author of this document was Prof. Jon Van Dyke[10], professor of law at the William S. Richardson School of Law, University of Hawaii.

As noted by State Auditor this proposal that OHA be terminated and replaced by a sovereign OHA entity is, in itself, a breach of trust.

Substantial opposition to this plan arose, because OHA proposed to replace the several groups already existing, such as The Hou Hawaiians, Ka Lahui Hawai'i and others. In spite of the Hawaiian community opposition to the Blueprint, on February 7, 1992, OHA adopted proposed legislation to implement the plan. The legislation consisted of three bills -- the "Native Hawaiian[11] Recognition and Restoration Act" ("Sovereignty Bill"), purporting to establish a sovereign government to represent The Hou Hawaiians and all other Hawaiians and native Hawaiians; the "Native Hawaiian[12] Claims Settlement Act", ("Claims Settlement Bill"), which purports to settle all land claims by The Hou and all other Hawaiians and native Hawaiians against the state of Hawaii and United States; and the "Federal Right-to-Sue Act", which purports to create a statutory right for Hawaiians to sue to enforce their rights under § 5(f) and HHCA.

The Claims Settlement Bill provides that the United States will transfer to the government established by the Sovereignty Bill all lands and submerged lands which

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[10] Prof. Van Dyke is the husband of attorney Sherry Broder, both of whom are on contract to represent OHA. The Hou are aware that Prof. Van Dyke occasionally entertains members of this Court on their visits to Hawaii. In light of the frequency with which the issue of native Hawaiian rights has come before this Court in recent years, The Hou assume that he has not discussed this issue during these meetings. However, they cannot help but have their doubts.

[11] See footnote 9.

[12] See footnote 9.

formerly belonged to the Kingdom of Hawaii, § 4(a)(1); the Hawaii National Parks, § 4(a)(4); and $10 billion as compensation for the use of these lands since annexation of Hawaii in 1898, § 4(b)(1).

Under the Claims Settlement Bill, the state would convey all of the "available lands", 20 percent of the remaining § 5(f) lands and 20 percent of the income from the remaining § 5(f) lands, to the United States, in trust, for the use of the government created by the Sovereignty Bill, § 5(a)(1). In exchange for this, the state will receive title to the remaining § 5(f) lands free and clear from any further claim by Hawaiians or native Hawaiians.[13]

In the 1993 session of the Hawaii State Legislature, OHA introduced a bill similar to the Sovereignty Bill, as House Bill 1992 [First draft]. During three days of testimony, hundreds of Hawaiians demonstrated and scores of Hawaiians testified against the bill. The Hou Hawaiians opposed the bill on the grounds that the State does not have constitutional authority to establish a sovereign native government to represent them. The Hou, themselves, claim to be a sovereign Native American tribal *ohana* and do not choose to be represented by any government created by the State of Hawaii. Other Hawaiian organizations also claim to be Native American sovereign entities. Ka Lahui Hawaii, the largest of these with about 20,000 members, vigorously opposed the state-created "sovereign" Hawaiian government.

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[13] Sec. 7(b) of the Claims Settlement Act provides:

> Receipt by the United States on behalf of the [government created by the Sovereignty Bill] of the benefits provided by Section 5 of this Act shall constitute a complete and total waiver of all claims of Native Hawaiians against the State of Hawaii for land or damages arising out of the overthrow of Queen Liliuokalani in 1893 and the annexation of Hawaii by the United States in 1898 and the subsequent receipt of the Crown and Government lands of the Kingdom of Hawaii by the State of Hawaii.

In light of the overwhelming opposition to it, OHA's bill was gutted and completely rewritten to create a Hawaiian Sovereignty Advisory Commission, all of the members of which were appointed by the Governor, and are state Indians. The task of this commission was to report to the legislature on the question of holding a plebiscite among OHA's constituency on the question of whether or not the state should proceed to create a sovereign government to represent them.

In his State of the State address to the Hawaii Legislature, on January 27, 1994, Gov. Waihee commented on the sovereignty question as follows:

> "In 1993, sovereignty was front and center in a year of recognition and reflection. 1994 brings the necessity of action. Clearly, there are few today who doubt that sovereignty will happen. It is a matter of how, when and in what form.
>
> As you know, the state cannot confer sovereignty. That is the kuleana (concern) of the federal government, with many steps yet to be taken.
>
> Now is the time to press even harder on the federal front. At long last, talks have begun with the Department of Interior on land claims, political status, trust responsibility.

Honolulu *Advertiser*, January 28, 1994, p. A-15.

In light of the magnitude of OHA's claims against the United States, it is apparent why it is necessary to change the definition of native Hawaiian. There are simply not enough native Hawaiians to justify these claims. Further, by changing the definition of native Hawaiian, the few thousand members of the existing Hawaiian organizations who claim sovereignty can easily be outvoted.

It might seem improbable that such enormous claims would be given serious consideration by Congress, even if made on behalf of 250,000 purported claimants. But Hawaii's Congressional delegation has been working on this plan as well. Sen. Daniel Inouye recently succeeded

in adding an appropriation into the defense budget for $500 million to "clean up" Kaho'olawe.

Kaho'olawe is an uninhabited island south of Maui, which has been used by the Navy for target practice since the 1950's. The appropriation is to clear the island of unexploded ordinance so that the island can be "returned" to OHA's Hawaiian sovereign nation and used as a gambling resort. The Hou question whether this enormous expenditure was necessary or worthwhile. It is certain that none of this money will be spent in a way that will benefit native Hawaiians. That amount of money would have been more than adequate to complete the Hawaiian Homestead program.

Meanwhile, Sen. Daniel Akaka has obtained Congressional approval of a resolution "apologizing" for the wrongful role played by the United States in the overthrow of the government of Queen Liliuokalani. In so doing, Congress has unknowingly already approved many of the findings that form the basis for OHA's Sovereignty Bill.

This apology is now being used as the basis for the argument that the state of Hawaii was wrongfully and illegally created. On January 9, 1994, the Honolulu *Advertiser* reported that Dennis Kanahele resigned in protest from the Hawaiian Sovereignty Advisory Commission. The paper reported that

> He explained that his resignation was prompted by a speech delivered in Honolulu last month by Francis Anthony Boyle, a professor of international law at the University of Illinois.
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> Boyle noted that Congress approved a resolution last fall apologizing to native[14] Hawaiians for U.S. involvement in the overthrow of the Hawaiian monarchy in 1893. In approving that measure, Boyle said, the United States conceded that native Hawaiians

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[14] See footnote 9.

have a right to restore their status as an independent nation.

"Congress is effectively conceding now that the (statehood) vote is meaningless, as a matter of international law and United States domestic law. So you're not bound by it. Rather I'm suggesting you're now free to determine your own fate pursuant to the principle of self-determination." Boyle said.

Meanwhile, an article titled "Molokai fire called resort protest" appeared on page 1 of the January 28, 1994 *Advertiser*, as follows:

"Frustration" over losing water in favor of a resort development led to a fire at two construction trailers at a Central Molokai water pipeline project, Hawaiian leader Sam Kealoha says.

Police say yesterday's fire -- which is not expected to delay the project -- was deliberately set. Kealoha, an Office of Hawaiian Affairs trustee, said the fire was undoubtedly an attempt to protest the project.

Residents fear the project to pump water to the Kaluakoi Resort in West Molokai will leave no water for Hawaiian homestead lands in Central Molokai. And they say neither the state nor the county is responding to their concern.

"Frustration, that's what it is," Kealoha Said.

Honolulu *Advertiser*, January 28, 1994, p. 1.

On January 30, 1994, the following letter from Lilikala Kame"eleihiwa, Director of the Center for Hawaiian Studies at the University of Hawaii appeared in the *Advertiser*:

It is outrageous and maha'oi (rude) in the extreme that the haole editors of The Honolulu Advertiser think they have the right to object to native Hawaiians living on Hawaiian trust lands (Editorial, "Beach squatters: These parks are for all to enjoy," Jan. 19). Of course, the only reason haole editors have any right to do so is because of the American military presence in Hawaii.

American military presence shores up bastions of haole power like The Honolulu Advertiser, whose staff is overwhelmingly haole at the editorial and reporter level and whose reporting shapes public opinion. The Advertiser has not a single Hawaiian reporter or editor on staff. With no Hawaiian voice, they easily twist the truth with anti-Hawaiian bias.

They asked, "Should anyone with Hawaiian blood be free to occupy whatever vacant lands they fancy?" Correction: The lands being presently occupied are Hawaiian trust lands as defined by American law. American law also defines Hawaiians as wards of the state, barring us from suing in court for access to our trust lands.

The editors argue that beach parks are for all to enjoy "now and forever, and that Hawaiians living on the beaches "deny their use to everyone else." Wake up, Advertiser. It's not Hawaiians who obstruct access to the miles of beaches in Hawaii, it is rich foreigners and hotels who do so.

And don't be too sure about control "forever." British colonials discovered that natives can't be oppressed indefinitely!

Honolulu *Advertiser*, January 30, 1994, p. B-3.

While the Hou Hawaiians claim to be a sovereign native Hawaiian *ohana* or tribal body, they have no desire to declare independence from the United States or secede from the Union. The Hou trust the Constitution and laws of the United States will protect their rights as a minority much more effectively than a sovereign nation created by OHA and the state of Hawaii. The Hou believe that the courts, rather than streets, are the proper forum to assert their rights and redress their griviences with their government.

The Ninth Circuit has repeatedly held that they have the right to sue. As Director of the Center for Hawaiian Studies and the University of Hawaii, the writer of this letter should have known that. The Hou have been

litigating for 14 years with little apparent success. So far the Court has not actually allowed them to address the merits of any of their claims. *Price v. State of Hawaii*, 764 F.2d 625, 626 (9th Cir. 1985), *cert. denied* , 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986) ("*Price I*"); *Akaka I, supra*; *Price v. State of Hawaii*, 921 F.2d 950, (9th Cir. 1990) ("*Price II*"); *Price v. State of Hawaii*, 939 F.2d 702, (9th Cir. 1991), *cert. denied sub nom Paty v. Price*, 117 L.Ed.2d 622 (1991) ("*Price III*"); *Akaka II, supra*.

This only adds to the frustration of the native Hawaiians and statements like those contained in this letter.

Nevertheless, The Hou have been persistent in attempting to establish the parameters of the native Hawaiian's right to sue under § 5(f). In these cases, the state has repeatedly raised the issues of standing and whether the Admission Act creates an enforceable right under § 1983. The state's continual relitigation of these issues discourages native Hawaiians from seeking judicial redress.

If certiorari is granted herein, these threshold issues will necessarily be decided also. One decision from this court will definitively resolve many issues that may never be finally settled in the Ninth Circuit. A substantial body of law in the Ninth Circuit will enable this Court to properly consider these questions. In addition to the "Price" cases cited above, the Ninth Circuit has also decided the following cases which involve § 5(f) claims: *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, (9th Cir. 1978), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979); *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homess Comm'n.*, 739 F.2d 1467, (9th Cir. 1984); *Ulaleo v. Paty*, 902 F.2d 1395, (9th Cir. 1990); and *Napeahi v. Paty*, 921 F.2d 897, (9th Cir. 1991), *cert. denied*, 116 L.Ed.2d 230 (1991).

Further, this court has decided several cases involving claims against state officials by or on behalf of land

grant beneficiaries under statehood admissions acts. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989); *Papasan v. Allain*, 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); *Lassen v. Arizona*, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967).

CONCLUSION

For the foregoing important reasons, the Hou respectfully request this Court to issue its Writ of Certiorari to the Ninth Circuit Court of Appeals to review the opinion in *Price v. Akaka*, C.A. No. 92-16462, filed August 23, 1993, amended November 2, 1993, and published as *Price v. Akaka*, 9 F.3d 1220 (9th Cir. 1993).

Dated: Honolulu, Hawaii, January 31, 1994.

Respectfully submitted,

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